

EX PARTE OR LATE FILED

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Ex Parte

November 22, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket Nos. 96-98 and 99-68
Implementation of the Local Competition Provisions of the Telecommunications Act of
1996: Inter-Carrier Compensation for ISP-Bound Traffic

Dear Ms. Salas:

Attached please find a White Paper entitled "A Legal Roadmap for Implementing A Bill and Keep Rule for all Wireline Traffic" of Qwest Communications International, Inc., for inclusion in the record of the above-referenced proceeding. In addition, we are submitting copies of the cover letters to various Commission personnel to whom we sent copies of the attached White Paper.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with your office for inclusion in the public record.

Acknowledgement and date of receipt of this submission are requested. A duplicate of this letter is provided for this purpose. Please call if you have any questions.

Sincerely,



Lynn R. Charytan

Counsel for Qwest Communications International, Inc.

Attachment

cc(w/encl.): William E. Kennard, Gloria Tristani, Susan Ness, Michael Powell, Harold Furchtgott-Roth, Jane Jackson, Dorothy Attwood, Anna Gomez, Jordan Goldstein, Kyle Dixon,

Deena Shetler, Tamara Preiss, Rebecca Beynon, Christopher J. Wright, Jonathan Nuechterlein, John E. Ingle, Laurence N. Bourne, Paula Silberthau, Debra Weiner, Glenn Reynolds, Adam Candeub, Rodney McDonald, ITS

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November 22, 2000

Mr. William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

Dear Chairman Kennard:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

In you have any questions about these matters, please do not hesitate to contact me.

Sincerely,



Lynn Charytan

Enclosure

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November 22, 2000

Ms. Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-C302
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**


Dear Commissioner Tristani:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

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Sincerely,



Lynn Charytan

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November 22, 2000

Ms. Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-B115
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

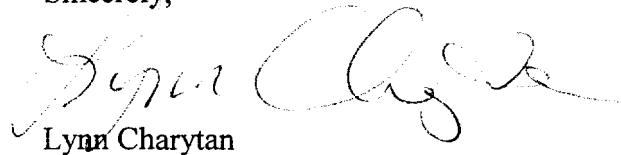
Dear Commissioner Ness:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

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Sincerely,



Lynn Charytan

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November 22, 2000

Mr. Michael Powell
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-A204
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

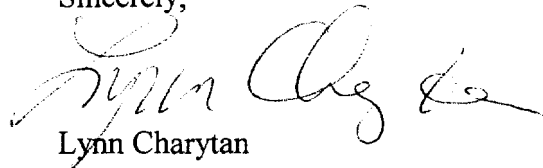
Dear Commissioner Powell:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

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Sincerely,



Lynn Charytan

Enclosure

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November 22, 2000

Mr. Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-A302
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

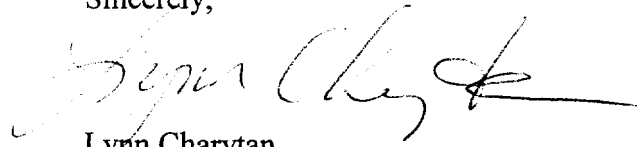
Dear Commissioner Furchtgott-Roth:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

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Sincerely,



Lynn Charytan

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November 22, 2000

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
5th Floor
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

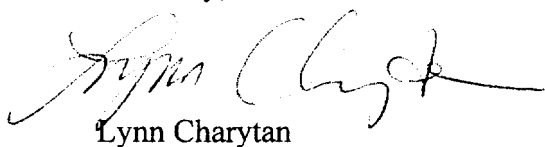
Dear Ms. Attwood:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

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Lynn Charytan

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November 22, 2000

Mr. Glenn Reynolds
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

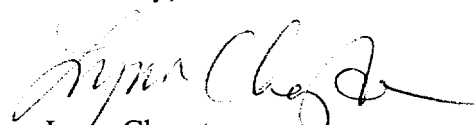
Dear Mr. Reynolds:

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Lynn Charytan

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November 22, 2000

Mr. Rodney McDonald
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

Dear Mr. McDonald:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

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Lynn Charytan

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November 22, 2000

Mr. Adam Candeub
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

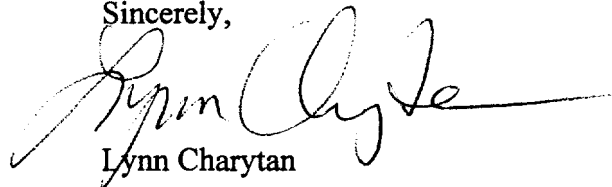
Dear Mr. Candeub:

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Sincerely,



Lynn Charytan

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November 22, 2000

Mr. Christopher J. Wright
General Counsel
Federal Communications Commission
445 12th Street, SW
Room 8-C723
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

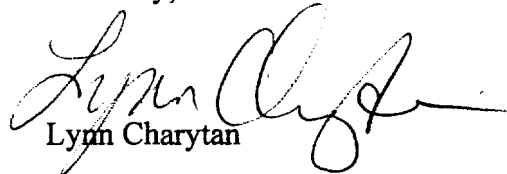
Dear Mr. Wright:

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Sincerely,


Lynn Charytan

Enclosure

cc: Jonathan Nuechterlein
John E. Ingle
Laurence N. Bourne
Paula Silberthau
Debra E. Weiner



Qwest
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3123
Facsimile 202.296.5157

Melissa E. Newman
Vice President-Federal Regulatory

Federal Communications Commission
445 12 Street, SW
Washington, DC 20554
Attn: Mr. Jordan Goldstein

Dear Jordan:

Attached is a paper Qwest prepared on the legal issues regarding a bill and keep mechanism for internet bound traffic. We take a slightly different approach to this issue than what has been discussed previously. The executive summary provides a short synopsis of the material in the paper. We hope that we can set up a meeting with you in the near future to discuss the paper and other issues/questions you have on reciprocal compensation.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

I hope you have a Happy Thanksgiving.

A handwritten signature in cursive script, appearing to read "Melissa E. Newman".

Melissa



Qwest

1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3123
Facsimile 202.296.5157

Melissa E. Newman

Vice President-Federal Regulatory

Federal Communications Commission
445 12 Street, SW
Washington, DC 20554
Attn: Mr. Kyle Dixon:

Dear Kyle:

Attached is a paper Qwest prepared on the legal issues regarding a bill and keep mechanism for internet bound traffic. We take a slightly different approach to this issue than what has been discussed previously. The executive summary provides a short synopsis of the material in the paper. We hope that we can set up a meeting with you in the near future to discuss the paper and other issues/questions you have on reciprocal compensation.

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Melissa



Qwest
1020 Nineteenth Street NW, Suite 700
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Melissa E. Newman
Vice President-Federal Regulatory

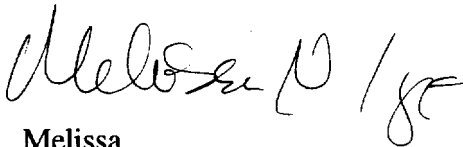
Federal Communications Commission
445 12 Street, SW
Washington, DC 20554
Attn: Ms. Deena Shetler:

Dear Deena:

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Melissa

**Qwest**

1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
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Vice President-Federal Regulatory

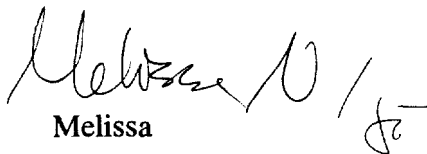
Federal Communications Commission
445 12 Street, SW
Washington, DC 20554
Attn: Ms. Rebecca Beynon

Dear Rebecca:

Attached is a paper Qwest prepared on the legal issues regarding a bill and keep mechanism for internet bound traffic. We take a slightly different approach to this issue than what has been discussed previously. The executive summary provides a short synopsis of the material in the paper. We hope that we can set up a meeting with you in the near future to discuss the paper and other issues/questions you have on reciprocal compensation.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

I hope you have a Happy Thanksgiving.



Melissa

**Qwest**

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Melissa E. Newman

Vice President-Federal Regulatory

Federal Communications Commission
445 12 Street, SW
Washington, DC 20554
Attn: Ms. Anna Gomez

Dear Anna:

Attached is a paper Qwest prepared on the legal issues regarding a bill and keep mechanism for internet bound traffic. We take a slightly different approach to this issue than what has been discussed previously. The executive summary provides a short synopsis of the material in the paper. We hope that we can set up a meeting with you in the near future to discuss the paper and other issues/questions you have on reciprocal compensation.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

I hope you have a Happy Thanksgiving.

Melissa

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November 22, 2000

Ms. Tamara Preiss
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

Dear Ms. Preiss:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

In you have any questions about these matters, please do not hesitate to contact me.

Sincerely,


Lynn Charytan

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November 22, 2000

Ms. Jane Jackson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Presentation
Inter-Carrier Compensation for ISP Bound Traffic
CC Docket 99-68**

Dear Ms. Jackson:

Attached please find a white paper that Qwest has prepared, considering the legal issues surrounding the application of a bill and keep rule to Internet-bound telephone traffic and to wireline traffic more generally. We include an executive summary that provides a short synopsis of the material in the paper.

In accordance with Section 1.1206(b)(1) of the FCC's Rules, an original and four copies of this letter are being filed with the Secretary's office for inclusion in the public record.

In you have any questions about these matters, please do not hesitate to contact me.

Sincerely,


Lynn Charytan

**A Legal Roadmap for Implementing
A Bill and Keep Rule for All
Wireline Traffic**

Prepared by Qwest Communications International, Inc.

For Inclusion in CC Docket Numbers 96-98 and 99-68
Implementation of the Local Competition
Provisions of the Telecommunications Act of
1996: Inter-Carrier Compensation for
ISP-Bound Traffic

DATE 11-22-00

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EXECUTIVE SUMMARY

The Commission is continuing to struggle with the conundrum posed by what is called “ISP reciprocal compensation” — the massive diseconomies created when a CLEC serves a large number of Internet Service Providers and establishes a huge subsidizing revenue stream from a neighboring ILEC solely on account of one-way connections between the ILEC’s customers and the Internet. While the Commission has been considering this issue for some time, its current deliberations are guided by the Court of Appeals decision in *Bell Atlantic*, in which an earlier Commission determination that ISP reciprocal compensation was not subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecommunications Act was reversed for lack of sufficient reasoned decision making.

This paper examines the Commission’s options in dealing with the ISP reciprocal compensation issue in light of *Bell Atlantic*. We have proposed legal arguments designed to support the economic and public policy analyses that document that the best method of treating inter-carrier compensation in the context of ISPs is what is called “bill and keep,” where both carriers participating in a partnership to provide a connection between the ISP customer of one carrier and the end user customer of the other bear their own costs. As we demonstrate, there are various means of approaching a bill and keep regime in the wake of the *Bell Atlantic* decision. One legal quandary that we address is the fact that the Commission has suggested that section 252(d) of the Act permits mandatory bill and keep for local traffic *only* when traffic between two carriers is relatively in balance; thus, in the case of ISP reciprocal compensation, it would seem potentially anomalous to order bill and keep for the express reason that the traffic is so seriously out of balance as to create public policy dangers. Nevertheless, we conclude that proper analysis fully supports a regulatory structure in which ISP reciprocal compensation is handled via bill and keep, either alone or in conjunction with bill and keep for traffic more clearly identified as local in nature. Indeed, we suggest that this approach is possible even if the Commission does not revisit its rule concerning the need for traffic to be balanced, although it certainly may do so.

This paper presents two approaches which provide a legal foundation for a bill and keep regime for ISP and local traffic:

- ISP traffic can be treated as non-local in nature and not subject to the reciprocal compensation provisions of section 251(b)(5) at all. This is the approach initially taken in the order reversed in *Bell Atlantic*. However, review of the record and the *Bell Atlantic* decision demonstrates that the Commission can quite comfortably conclude that, consistent with the directions of the Court and with reasoned decision making, delivery of ISP traffic to a CLEC is not subject to the reciprocal compensation provisions of section 251(b)(5) because delivery of Internet-bound traffic to the ISP does not constitute either transport or termination of that traffic. A bill and keep structure can still be made applicable to other local traffic pursuant to the provisions of section 251(b)(5).
- ISP traffic can be treated as subject to 251(b)(5), but still subject to a bill and keep regulatory structure. This conclusion does not require that the Commission abandon its prior analysis that section 252(d)(2) requires that costs be reasonably in balance as a prerequisite to ordering bill and keep as a regulatory requirement. Bill and keep for ISP traffic pursuant to

section 252(d)(2) can be ordered simply on the recognition that, in the case of ISP traffic, the originating LEC is not the cost causer in any cognizable economic sense. So long as the structure permits the CLEC to recover its costs from the entity with which such costs are “associated” — the ISP which is its customer — bill and keep would be consistent with the Act.

The Commission could also implement bill and keep for ISP traffic by denying reciprocal compensation for carriers that offer service only to a limited number of customers based on Internet arbitrage, and by forbearing from enforcing the reciprocal compensation pricing rules in section 251(d)(2). While these are discussed in this paper, they are not optimal and we do not recommend that they be adopted.

A LEGAL ROADMAP FOR IMPLEMENTING A BILL AND KEEP RULE FOR ALL WIRELINE TRAFFIC

For several years, the Commission has been wrestling with the problem of “ISP reciprocal compensation” — whether and how the Commission’s rules implementing 47 U.S.C. § 251(b)(5) apply to the dial-up connections between Internet service providers (“ISPs”) and their subscribers when two or more carriers collaborate to provide such connections. Many parties have sought to exploit the current rules by creating ISP-only carriers that exist primarily to tap into the significant flow of reciprocal compensation payments that these incoming-only customers generate, creating a massive transfer of wealth to these carriers from the ratepayers of the incumbent LECs. The current compensation regime distorts the marketplace, discouraging carriers from building networks to serve the residential customers who initiate these dial-up connections, and rewarding carriers for restricting their services to ISPs exclusively. Under the present rules, incumbent LEC ratepayers subsidize the carriers serving ISPs with hundreds of millions of dollars a year, regardless of whether those ratepayers use the Internet themselves.

The Commission is well aware of these harms, which have been documented in multiple rounds of comments and ex partes over the past four years, and which have spawned extensive debate on Capitol Hill as well. The Commission took a first step toward addressing these problems last year by ruling that ISP dial-up calls transmitted from one LEC to another fall outside section 251(b)(5) because they do not terminate locally with the ISP, *see Declaratory Ruling and Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*Reciprocal Compensation Declaratory Ruling*”). However, the D.C. Circuit vacated and remanded this initial effort because it found that the Commission

had not adequately explained its reasoning. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (“*Bell Atlantic*”).

Qwest understands that the Commission is using this remand as an opportunity to explore comprehensive legal and practical solutions to the question of ISP reciprocal compensation. One solution the Commission reportedly is considering is a “bill and keep” rule for ISP dial-up traffic, or for local and ISP dial-up traffic alike. As Qwest and other parties have demonstrated in their comments and ex parte presentations to the Commission, given the current ESP exemption from carrier access charges, a bill and keep compensation structure represents the economically optimal solution to the problem of ISP reciprocal compensation. The purpose of this paper is to articulate and analyze legal arguments that would support implementation of a bill and keep structure for Internet-bound traffic, either in isolation or together with other kinds of wireline traffic.

I. General Approaches to Implementing Bill and Keep.

A bill and keep rule for Internet-bound traffic could be grounded on one of two sources of authority. If the Commission deems ISP dial-up calls non-local or otherwise outside section 251(b)(5), any intercarrier compensation rule would have to be based on the Commission’s general authority under 47 U.S.C. § 201. If, on the other hand, Internet traffic were deemed to be within the ambit of section 251(b)(5), then any bill and keep transport and termination rates for that traffic (or some broader range of traffic encompassed by section 251(b)(5)) would have to be set in accordance with 47 U.S.C. § 252(d)(2). Section 252(d)(2) prevents a state commission from approving a section 251(b)(5) reciprocal compensation arrangement unless the arrangement “provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination . . . of calls that originate on the network facilities of the other carrier,”